WorkCover independent review office

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RECOMMENDATION FOLLOWING AN APPLICATION FOR REVIEW OF THE INSURER'S WORK CAPACITY DECISION PURSUANT TO SECTION 44(1)(c) OF THE *WORKERS COMPENSATION ACT* 1987*.*

SUMMARY:

a. The application is dismissed and I make no recommendation.

Background

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 27 September 2013. The decision stated that payments were to cease on 4 January 2014. The applicant sought internal review. The Internal Review Decision (IRD) was issued on 19 May 2014[1]. The applicant sought Merit Review by the Authority on 29 May 2014. A Merit Review recommendation was issued on 20 June 2014.

2. The applicant was injured on 15 May 2007. The lower back injury arose out of the applicant driving from Sydney to North Canberra. Liability was accepted and the applicant has not returned to work in any capacity since. The Insurer made weekly payments as required under the provisions of the *Workers Compensation Act* 1987 (1987 Act).

3. Section 44A of the 1987 Act allows the Insurer to undertake a work capacity assessment, but it is not required before making a decision (section 44A(3)).

4. The relevant version of the *WorkCover Work Capacity Guidelines (Guidelines)* is the one which came into effect on 12 August 2013. The *Guidelines* provide instructions and guidance to Insurers regarding the appropriate and consistent application of work capacity assessments and decisions.

[1] The considerable delay resulted from the applicant only seeking internal review in May 2014, some eight months after the original decision was made.

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5. Once the Insurer has conducted an assessment then the Insurer may make a work capacity decision. Where that decision involves a reduction in or cessation of the weekly benefits payable to the injured worker then the Insurer is required to give proper notice to the worker (see section 54(2)(a) of the 1987 Act).

Submissions by the parties

6. Section 44(1)(c) of the 1987 Act states that this review is "*only of the insurer's procedures in making the work capacity decision and not of any judgment or discretion exercised by the insurer."* In this case the Insurer has provided a very clear and fair summary of the submissions of both parties (perhaps more accurately the submissions of the applicant and the reply to those submissions by the Insurer), which I reproduce as follows:

Application for Procedural Review of Work Capacity Decision by the WorkCover Independent Review Officer

- In making his Application for Procedural Review of Work Capacity Decision by the WorkCover Independent Review Officer, [the applicant] made written submissions as follows:-
  1. Seeking a review as pain and restrictions is not documented in all reports
  2. It's been decided I can't do old job however I can do other jobs 15 hours or more however still no mention of pain or restrictions
  3. Specialist need to ask or document all questions and answers with more details with uniform guidelines or direct questions form organisation (WorkCover)
  4. Sent to biased Independent Medical Examiner
  5. Insurance procedures into organising meetings with 3rd party be officially managed better. Letters dated 06/08/2013 and 09/08/2013 or with injured worker letter dated 17/03/2014 (not knowing if claim is open or closed)
  6. M[] R F[] report dated 13 February 2014.

Insurer's response to Application for Procedural Review of Work Capacity Decision by the WorkCover Independent Review Officer

In response to the worker's submissions above, [the Insurer] responds as follows, taking into account that his submissions do not relate to the procedures followed by [the Insurer] in preparing his Work Capacity Decision and Internal Review:

1. [The Insurer] notes [the applicant] is seeking a review of the information considered and relied upon as part of the Work Capacity Decision dated 27/09/2013, the Internal Review Decision dated 19/05/2014 and the Merit

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Review Decision dated 20/06/2014. Pain is taken into consideration by his treating doctors and specialists and documented where required. It does not necessarily prohibit [the applicant] from performing a role to which it was deemed suitable both by [the Insurer] and the Merit Review Service.

2. This is addressed in both the Work Capacity Decision and the Internal Review, the identified roles were reviewed by an Independent Medical Examiner as to date the worker even though he states that he is in considerable pain has not been back to his nominated treating doctor since 2011.
3. This is not a procedural issue in relation to the Work Capacity Decision nor Internal Review
4. There is no basis for this comment
5. These letters do not form part of the Work Capacity Decision nor Internal Review – thus these letters do not form part of this procedural review
6. The report was reviewed by [the Insurer] as part of the Internal Review

7. Points 1-2 are clearly not procedural, and cannot be relevant. Point 3 is procedural, but obtuse. I do not understand what the applicant is objecting to, and from the response by the Insurer it is clear that they have no idea either. Point 4 is only interesting because the applicant added a hyperlinked web-address which contains what can only be described as defamatory descriptions of medical practitioners, source unknown. The Insurer's response was measured, given the possibilities. I accept what the Insurer says about point 5. Point 6 refers to a report by an IME dated 13 February 2014, which clearly post-dates the work capacity decision. Since I am conducting a review of that earlier decision (rather than reviewing the merits of the claim itself), the report cannot be relevant to this procedural review.

The Decision

8. The decision notes that the applicant's own Nominated Treating Doctor (NTD) had not seen the applicant for "a year," which must call into question why the applicant was being paid at all. Section 44B(1)(a) clearly requires a worker to produce a "certificate of capacity" which only has currency of "not exceeding 28 days" [see s44B(3)(b)] in the absence of "special reasons" [see s 44B(4)]. In the circumstances, the Insurer might note section 44B(6).

9. The Insurer further noted that the NTD regarded the case as "finished," he did not wish to be involved in workers compensation cases and he

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did not wish to remain the NTD of this applicant. The NTD thought it would be best for the applicant if work capacity certificates were issued "by another doctor." This was communicated to the applicant by the Insurer, which then asked the applicant to find a new NTD for the purpose of presenting certificates under section 44B(1)(a). The applicant declined to do so.[2]

10. The application for procedural review was made approximately eight months after the original decision was sent to the applicant. No explanation was provided for this delay. Despite this, the Insurer conducted the internal review and raised no objection to the delay at merit review.

11. The insurer has given the correct period of notice, has fully explained the reasoning behind the decision, has relied on recent[3] medical evidence, has fully explained the consequences of the decision and has gone beyond what is strictly required by the *Guidelines* and legislation to assist the applicant in understanding the decision.

FINDING

12. I find that the Insurer has managed to follow the procedures as set out in the WorkCover *Guidelines* which is required by Section 44A of the 1987 Act. The Insurer has also relevantly applied the 1987 Act, and where it has failed to do so it has been for the benefit of the worker (see paragraph 8, *supra*). Such failures arose in the course of claim management, not the work capacity decision making process and are therefore irrelevant for current purposes.

RECOMMENDATION

13. The application is dismissed and I make no recommendation.

[2] This again raises the s 44B(6) issue (see paragraph 8, *supra*.)
[3] If not "current."

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